

Decision 04-11-020 November 19, 2004

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company (U39M), a California Corporation, and City of Santa Rosa, a California Charter City, for an Order Ratifying Permanent Easements Granted to the City of Santa Rosa by Pacific Gas and Electric Company and Authorizing the Sale and Conveyance of Certain Parcels of Land in Sonoma County to the City of Santa Rosa pursuant to California Public Utilities Code Section 851.

Application 03-08-003
(Filed August 6, 2003)

**OPINION APPROVING SALE OF REAL PROPERTY
UNDER PUBLIC UTILITIES CODE SECTION 851**

Summary

Pacific Gas and Electric Company (PG&E) is authorized to sell and convey to City of Santa Rosa (Santa Rosa) approximately 115.5 acres of land in Sonoma County. PG&E's request that we ratify PG&E's earlier grant to Santa Rosa of easements over a portion of that property is moot. Allocation of the gain from the sale is deferred to our rulemaking on that topic, and this proceeding is closed.

Background

PG&E's Request

PG&E seeks Commission approval under Public Utilities Code Section 851 to sell and convey approximately 115.5 acres of land located in an isolated area of the Mayacamas mountains in northeast Sonoma County to Santa Rosa. PG&E

proposes that the net-of-tax proceeds be recorded as a gain to shareholders. In addition, PG&E requests that the Commission ratify easements previously granted to Santa Rosa over a portion of that same property.

Santa Rosa's Project

Santa Rosa is purchasing the property for a pipeline and a pump station facility that are part of the Geysers Recharge Project, a large wastewater reclamation project in which reclaimed water will be injected into the Geysers Known Geothermal Resources Area to produce steam for electric generation.

The Sale

The property to be sold consists of five parcels originally acquired in 1971, 1972 and 1975 for construction of a new switching station as part of an expansion of PG&E's Geysers Power Plant. When the expansion project was abandoned, the switching station and the property were no longer needed. Four electric transmission lines traverse the property, but PG&E makes no other use of it and does not foresee that it will ever be useful for public utility purposes. PG&E will continue to enjoy easements across the property sufficient for all present and future public utility needs, including the right to expand or construct new facilities. Accordingly, PG&E agrees that any future easement expansion costs which are not funded by new customers pursuant to the tariffs will be borne by the company and will not be reflected in rates.

The total original cost of the property was \$112,015. The purchase price as set forth in the Purchase and Sale Agreement is \$250,000, the property's appraised value. The after-tax gain on sale will be approximately \$63,379.

Until 1990, PG&E classified the property as part of utility operations in its accounting records, and all associated taxes, maintenance costs and other revenue requirements were borne by ratepayers. Because land is not

depreciable, PG&E has not recovered the initial cost of the property from ratepayers through depreciation expense. PG&E ratepayers do pay shareholders a return on their investment in utility property in rate base, including land, but PG&E does not maintain figures reflecting the revenue requirement of specific assets, including this property. PG&E reclassified the property as non-utility in 1990, and all costs since then have been borne by shareholders.

As part of the Purchase and Sales Agreement, PG&E disclosed to Santa Rosa that, at some time during PG&E's ownership, it may have handled, treated, stored or disposed of hazardous substances on the property. PG&E has advised Santa Rosa to investigate the property, and Santa Rosa has agreed to execute prior to the close of escrow a Release and Indemnity Agreement in which it forever releases PG&E from any and all losses arising from past, present and future hazardous substances or electromagnetic fields affecting the property. The Release and Indemnity Agreement includes a general release in which Santa Rosa waives and relinquishes any and all rights it may have under California Civil Code Section 1542.¹

According to the Purchase and Sale Agreement, escrow was to close by March 31, 2002, a date subsequently extended for one year as permitted in the Agreement because Commission approval is needed. Commission approval was not sought before the anticipated closing date as extended. The Commission

¹ Civil Code Section 1542 provides, "A general release does not extend to claims which a creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."

recognizes that extension or modification of this provision, and possibly other minor modifications, may now be needed to complete the transaction.

PG&E foresees significant benefits from the sale. The easements it retains will allow it complete access for maintenance purposes with none of the attendant obligations. Specifically, it would no longer be responsible for maintenance costs or property taxes associated with the property, would have no liability for injury to trespassers or others entering onto the property, and has received a full release from Santa Rosa for any environmental hazards on the property. Moreover, Santa Rosa's completion of the Geysers Recharge Project will also provide significant benefits to the public, as the courts have noted in a case not directly related to this application.² In any case, Santa Rosa has repeatedly expressed its intention to acquire all parcels necessary for construction of the 40-mile pipeline project, and has indicated it would use its power of eminent domain if necessary to acquire them.

The Easements

At the time the application was filed, Santa Rosa had already begun constructing its pump station and underground pipeline on the property pursuant to permanent and temporary easements PG&E previously granted to it in 2001. The Easement Agreement, entered into on August 8, 2001, is Exhibit A to the application. Thus, in addition to authorization to sell the property, PG&E also requests the Commission ratify the permanent easements it granted previously.

² See *Johnson v. Sonoma County Agricultural Preservation and Open Space District*, 100 Cal. App. 4th at 978 (2002).

When PG&E granted the easements, it believed that the Easement Agreement met each of the requirements for such grants under General Order (GO) 69-C.³ Specifically, the easements did not affect utility operations and were entirely compatible with PG&E's continued use of the property; the grant was for limited uses expressly enumerated in the Easement Agreement; and the grant was to the City of Santa Rosa, which has the power of eminent domain, for a public project. Moreover, PG&E maintains, the Commission had historically approved of agreements between utilities and third parties that permitted third-party use of utility property pursuant to GO 69-C, even if the third-party use included physical changes to the property. However, in the same month that the Easement Agreement was executed, the Commission decided two PG&E applications by making explicit a narrow interpretation of the term "limited uses" for purposes of GO 69-C.⁴ In those decisions, the Commission held that

³ GO 69-C: "It is hereby ordered, that all public utilities covered by the provisions of Section 851 of the Public Utilities Code of this State be, and they are hereby authorized to grant easements, licenses or permits for use or occupancy on, over or under any portion of the operative property of said utilities for rights of way, private roads, agricultural purposes, or other limited uses of their several properties without further special authorization by this Commission whenever it shall appear that the exercise of such easement, license or permit will not interfere with the operations, practices and service of such public utilities to and for their several patrons or consumers;

"Provided, however, that each such grant, other than a grant by a public utility to the State of California or a political subdivision thereof for a governmental use superior to the use by the public utility under the provisions of Section 1240.610 of the Code of Civil Procedure, or a grant to the United States Government or any agency thereof for a governmental use, shall be made conditional upon the right of the grantor, either upon order of this Commission or upon its own motion to commence or resume the use of the property in question whenever, in the interest of its service to its patrons or consumers, it shall appear necessary or desirable to do so...."

⁴ Decision (D.) 01-08-069 and D.01-08-070.

significant physical construction on utility land resulting in permanent changes to utility property falls outside the scope of GO 69-C. PG&E says it has since taken a more conservative approach to the type of activity permitted under GO 69-C to ensure it complies with the Commission's interpretation of "limited uses." PG&E no longer allows public agencies to commence construction resulting in permanent changes on its property without prior Commission approval. In today's application PG&E seeks Commission ratification of the permanent easements granted to Santa Rosa.

The easements at issue lie entirely within the property to be sold and would be superseded by the sale. Because we have decided to approve the sale and transfer, our decision today renders moot PG&E's request that we ratify those easements, and we decline to do so.

Discussion

Pub. Util. Code § 851 provides that no public utility "shall sell, lease, assign, mortgage, or otherwise dispose of or encumber the whole or any part of its ... property necessary or useful in the performance of its duties to the public ... without first having secured from the commission an order authorizing it so to do." The Commission's role in examining transactions subject to Section 851 is the protection of the public interest.⁵ The Commission has determined that the public interest is served when utility property is used for other productive

⁵ Section 853(a): "This article [Article 6, Transfer or Encumbrance of Utility Property, Sections 851 through 856] ... shall apply to any public utility ... if the commission finds ... that the application of this article is required by the public interest."

purposes without interfering with the utility's operations,⁶ and such is the case here.

There is in addition a benefit to be gained here in that PG&E will no longer be responsible for the ongoing maintenance and carrying costs of property ownership (as distinguished from the costs of maintaining the electric facilities traversing the property), and the capital it would otherwise devote to that purpose may be put to other productive uses. PG&E has reserved in the grant deed sufficient access rights to ensure the sale will not impair the property's use for public utility purposes now or in the future. To assure its ratepayers and the Commission that is the case, it has agreed that any future easement expansion costs which are not funded by new customers pursuant to the tariffs will be borne by the company and will not be reflected in rates.

As PG&E also points out, Santa Rosa could be expected to exercise its power of eminent domain if it were necessary to do so. By agreeing to a sale, PG&E is securing the benefits of a negotiated outcome and avoiding the potential costs to itself, to Santa Rosa and to the public of the litigation that would accompany a condemnation proceeding.

We recently issued two other decisions in which, as we do today, we found PG&E at fault for misplaced reliance on GO 69C when our approval under Section 851 was required.⁷ Both of those situations presented similarities with

⁶ In D.93-04-019, p. 3, we observed: "Joint use of utility facilities has obvious economic and environmental benefits. The public interest is served when utility property is used for other productive purposes without interfering with the utility's operation or affecting service to utility customers."

⁷ D.04-10-036 in A.00-03-032, and D.04-10-018 in A.04-01-016.

the case before us, and both are also distinguishable from today's. There, as here, PG&E allowed significant construction under a lease or easement we later determined to have been improperly executed under GO 69C. There, as here, PG&E delayed filing an application for our approval under Section 851 to correct the improper grants. There, PG&E maintained that its earlier GO 69 agreements did not require our approval under Section 851, whereas in the instant application PG&E now acknowledges that Commission decisions issued shortly after the easements were granted did establish that our advance approval was needed.

In those cases, we declined to impose sanctions because it may not have been clear to PG&E when the transactions were executed that Section 851 approval was needed. And, in one of those earlier decisions, we made our approval of the lease prospective only. We arrive at the same results today: We will not impose sanctions, but we also decline to make our approval of PG&E's 2001 easement grants retroactive as PG&E requests.

We conclude that the proposed sale is in the public interest and should be approved.

Gain on Sale

PG&E and ORA concur that the total original cost of the property was \$112,015, the sales price is \$250,000, and the after-tax gain on sale will be approximately \$63,379. PG&E cites several Commission decisions in arguing to record the gain to shareholders. ORA cites others in arguing to split the gain 56% to ratepayers and 44% to shareholders in recognition of the time the

property was supported by each (18 years in rate base, and 14 years as non-utility property).⁸

⁸ *See, e.g.*, D.98-02-031, D.98-02-032, D.98-02-033, and D.98-04-009 cited by PG&E; and D.89-12-057 and D.87-12-067 cited by ORA.

The Commission recently initiated Rulemaking (R.) 04-09-003⁹ to consider policies and guidelines regarding allocation of the gains from sales of utility assets. We believe that it is more appropriate to consider the ratemaking issues raised by the parties in that forum. Therefore, as we have done in other recent Section 851 applications where this issue has arisen, we defer our decision on the allocation of PG&E's gain on sale to that forthcoming rulemaking. In the meantime, PG&E should record the net-of-tax gain in its Real Property Gain/Loss on Sale Memorandum Account, to accrue interest following the method established for that account

Environmental Review

The California Environmental Quality Act (CEQA, Public Resources Code Sections 21000, *et seq.*), applies to discretionary projects to be carried out or approved by public agencies. A basic purpose of CEQA is to inform governmental decision-makers and the public about the potential, significant environmental effects of the proposed activities.

Since the project is subject to CEQA and the Commission must issue a discretionary decision without which the project cannot proceed (*i.e.*, the Commission must approve the property sale pursuant to Pub. Util. Code § 851), the Commission must act as either a Lead Agency or a Responsible Agency under CEQA. The Lead Agency is the public agency with the greatest responsibility for supervising or approving the project as a whole.¹⁰ Here, Santa

⁹ R.04-09-003, Order Instituting Rulemaking on the Commission's Own Motion for the Purpose of Considering Policies and Guidelines regarding the Allocation of Gains from Sales of Energy, Telecommunications and Water Utility Assets.

¹⁰ CEQA Guidelines (Title 14 California Code of Regulations), Section 15051(b).

Rosa is the Lead Agency for the Geysers Recharge Project under CEQA and the Commission is a Responsible Agency. CEQA requires that the Commission consider the environmental consequences of a project that is subject to its discretionary approval. In particular, the Commission must consider the Lead Agency's environmental documents and findings before acting upon or approving a project.¹¹ The specific activities which must be conducted by a Responsible Agency are contained in the CEQA Guidelines, Section 15096.

PG&E states that environmental review of the Project has already been conducted by Santa Rosa as the Lead Agency under CEQA and that the Commission's role should be that of a Responsible Agency under CEQA. In support of its position PG&E submitted with its application a copy of Santa Rosa's April 1999 Draft Supplemental Environmental Impact Report (SEIR) for the Geysers Recharge Project Northern Section, which includes review of the five parcels PG&E proposes to sell in the application.¹²

As a Responsible Agency under CEQA we have reviewed the SEIR as well as the Santa Rosa City Council resolutions certifying the Project and publicly available on Santa Rosa's website,¹³ and we find those documents adequate for our decision-making purposes.

¹¹ CEQA Guidelines, Sections 15050(b) and 15096.

¹² Appendix F to the April 1999 Draft Supplemental EIR. The five parcels involved in the application and included in the environmental review analysis are: 141-070-033; 141-070-038; 141-070-040; 141-070-042; and 141-070-044.

¹³ <http://ci.santa-rosa.ca.us>. Resolution Numbers: 23168 (June 1997); 24046 (July 1999); 24677 (December 2000); 24365 (April 2000); 24727 (February 2001); and 24969 (September 2001).

Following certification of the Final EIR for the Project in June 1997 by Santa Rosa City Council Resolution No. 23168, further environmental analysis for the pipeline and associated pump stations was divided into three sections and SEIRs were prepared for each. The SEIR for the Northern Section involving Pine Flat Road was prepared including the PG&E parcels, and was reviewed for purposes of this application. The SEIR for the Northern Section was certified by the City Council in July 1999 by Resolution No. 24046. In March 2000, the City Council certified the Geysers Pipeline Construction Addendum – Upper and Lower Pine Flat Road, which evaluated various Project modifications. The Council certified the Modified Geysers Recharge Alternative with the Pine Flat Road Modified Alignment as previously studied in the SEIR. Both the original project and the adopted modifications were found to have significant and unavoidable environmental impacts. However, the modified Project reduced the number of significant unavoidable impacts from twenty-two to four. All other potentially significant environmental impacts identified in the EIR and SEIR were found to be either eliminated or reduced to less than significant levels through implementation of proposed mitigation measures. In approving the final Project modifications for the Northern Section, the Council adopted the SEIR Mitigation and Monitoring Plan, project update Addendums to the SEIR, and a Statement of Overriding Considerations finding that the overall benefits of the Project outweighed the significant and unavoidable environmental impacts.

Potential environmental impacts that could be reduced to less than significant levels were identified in the areas of land use (conversion of open space by Project components), geology (ground rupture and corrosive and expansive soil damage), wetland disruption (destruction of wetlands), biological resources (species disruption), air quality (dust), visual resources (view

disruption), and cultural resources (disturbance of eligible or unknown resources). The Mitigation and Monitoring Plan called for replacement open space easements to mitigate land use impacts, use of specified engineering methods and an earthquake plan to mitigate geology impacts, construction limitations and a disturbance plan to mitigate wetland disruption, monitoring and a resource protection plan to mitigate biological impacts, a dust control plan to mitigate air quality impacts, construction limitations to mitigate visual impacts, and identification and avoidance to mitigate cultural resource impacts. Certain significant and unavoidable impacts remained in the areas of geology, transportation, noise and visual. Pursuant to the Statement of Overriding Considerations, the following benefits were determined to outweigh the Project's potentially significant unavoidable impacts: superior use of water resources; maximizing current reuse opportunities while minimizing potential future limitations; protecting beneficial uses by minimizing discharge to the Russian River; best degree of weather independence, meeting Regional Board requirements; and high level of reliability afforded by diversity of types of reuse.

With respect to the potential environmental impacts that could be mitigated in the areas of land use, geology, wetland disruption, biology, air quality, visual resources, and cultural resources, we find that Santa Rosa adopted feasible mitigation measures to eliminate or reduce those impacts to less than significant levels and we adopt Santa Rosa's findings and mitigations for purposes of our approval. With respect to the significant unavoidable impacts in the areas of geology, transportation, noise and visual resources, we find that Santa Rosa enumerated reasonable benefits to outweigh the environmental impacts and justify Project approval. Accordingly, we also adopt the determination of the Statement of Overriding Considerations.

Procedural Considerations

The Commission in Resolution ALJ 176-3117 preliminarily categorized this as a ratesetting proceeding not expected to require hearings. The Commission's Office of Ratepayer Advocates (ORA) filed a timely protest to the application. ORA did not oppose PG&E's request for approval of the sale or ratification of the easements, but did advocate that the gain on sale be prorated between ratepayers and shareholders based on the time the property was in rate base. Assigned Administrative Law Judge (ALJ) McVicar held a prehearing conference on January 27, 2004, at which the parties agreed to file a joint statement of stipulated facts.¹⁴ There are no material facts in dispute, and there is no known opposition to the relief granted in this order. We conclude that it is not necessary to disturb our preliminary category and need for hearing determinations.

Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. No comments were received.

Assignment of Proceeding

Geoffrey F. Brown is the Assigned Commissioner and James C. McVicar is the assigned Administrative Law Judge in this proceeding.

¹⁴ *Pacific Gas and Electric Company and Office of Ratepayer Advocates' Joint Submission of Stipulated Facts*, filed March 5, 2004, is admitted into evidence as Exhibit 1.

Findings of Fact

1. The property to be sold consists of five parcels originally acquired in 1971, 1972 and 1975 for construction of a new switching station as part of an expansion of PG&E's Geysers Power Plant.

2. The total original cost of the property was \$112,015. The purchase price as set forth in the Purchase and Sale Agreement is \$250,000. The after-tax gain on sale will be approximately \$63,379.

3. Until 1990, PG&E classified the property as part of utility operations in its accounting records, and all associated taxes, maintenance costs and other revenue requirements were borne by ratepayers. PG&E reclassified the property as non-utility in 1990, and all costs since then have been borne by shareholders.

4. Four electric transmission lines traverse the property, but PG&E makes no other use of it and does not foresee that it will ever be useful for public utility purposes.

5. PG&E will continue to enjoy easements across the property sufficient for all present and future public utility needs, including the right to expand or construct new facilities.

6. Any future easement expansion costs on the property to be sold which are not funded by new customers pursuant to the tariffs will be borne by PG&E and will not be reflected in rates.

7. The proposed sale to Santa Rosa will not impair PG&E's ability to serve its customers.

8. PG&E and the public will benefit by the sale.

9. Extension and/or minor modifications of the Purchase and Sale Agreement may be needed to complete the transaction.

10. The easements for which PG&E seeks ratification lie entirely within the property to be sold. Because we have decided to approve the sale and transfer, our decision today renders moot PG&E's request that we ratify those easements.

11. Santa Rosa is purchasing the property for a pipeline and a pump station facility that are part of the Geysers Recharge Project.

12. Santa Rosa is the Lead Agency for the Project pursuant to CEQA.

13. The Commission is a Responsible Agency for the Project pursuant to CEQA.

14. Santa Rosa certified a Final Environmental Impact Report approving the Geysers Recharge Project in June 1997 and prepared a Northern Segment SEIR which includes the parcels of land subject to this application.

15. Santa Rosa approved the Modified Geysers Recharge Project Alternative with the Pine Flat Road Modified Alignment finding potential environmental impacts that could be mitigated to less than significant levels in the areas of land use, geology, wetland disruption, biology, air quality, visual resources and cultural resources. Implementation of the adopted Mitigation and Monitoring Plan was a condition of Project approval.

16. Santa Rosa adopted a Statement of Overriding Considerations determining that various Project benefits outweighed significant unavoidable environmental impacts associated with the Project in the areas of geology, transportation, noise and visual resources.

17. There is no known opposition to the authorization granted in this order.

Conclusions of Law

1. PG&E violated Section 851 by not securing our advance approval of the easements for which it now seeks ratification.

2. Determination of how to allocate the after-tax gain on sale should be deferred to the Commission's gain on sale rulemaking, R.04-09-003. In the meantime, the net-of-tax gain resulting from the sale should be booked to PG&E's Real Property Gain/Loss on Sale Memorandum Account and accrue interest following the method established for that account.

3. The Commission has considered Santa Rosa's environmental review documents and we find these documents adequate for our decision-making purposes.

4. With respect to the potentially significant environmental impacts in the areas of land use, geology, wetland disruption, biology, air quality, visual resources and cultural resources, we find that Santa Rosa adopted feasible mitigation measures to either eliminate or reduce these impacts to less than significant levels. We adopt Santa Rosa's findings and mitigations for purposes of our approval.

5. With respect to the significant unavoidable environmental impacts in the areas of geology, transportation, noise, and visual resources, we believe that in its Statement of Overriding Considerations, Santa Rosa identified reasonable Project benefits that outweigh the significant unavoidable Project impacts and we adopt the Statement of Overriding Considerations for purposes of our approval.

6. Approving the proposed sale is in the public interest.

7. A public hearing is not necessary.

8. The application should be granted as set forth in the following order.

9. This order should be made effective immediately to allow the sale to take effect expeditiously.

O R D E R

IT IS ORDERED that:

1. Pacific Gas and Electric Company (PG&E) is authorized to sell and convey to City of Santa Rosa the real property listed in, and in accordance with the terms and conditions set forth in, Application 03-08-003.

2. PG&E is authorized to enter into an extension of, and/or make minor modifications to, the Purchase and Sale Agreement if necessary to complete the transaction, without applying for additional Commission approval.

3. The mitigation measures outlined in the Geysers Recharge Project Environmental Impact Report and adopted by City of Santa Rosa are hereby made conditions of project approval by this Commission order.

4. PG&E shall record the net-of-tax gain resulting from the sale in its Real Property Gain/Loss on Sale Memorandum Account, to accrue interest following the method established for that account, and shall allocate that gain and interest as determined in the Commission's Rulemaking 09-04-003 or as otherwise directed by the Commission.

5. Application 03-08-003 is closed.

This order is effective today.

Dated November 19, 2004, at San Francisco, California.

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
SUSAN P. KENNEDY
Commissioners

I dissent.
/s/ CARL W. WOOD
Commissioner

I dissent.
/s/ LORETTA M. LYNCH

A.03-08-003 ALJ/JCM/sid

Commissioner